

California Acquisition Manual

PROCEDURE

CONTRACT CHANGES

CAM 3.7.2

DATE: 2/20/99

A. PURPOSE:

Describes the requirement for processing timely contract change transactions.

B. DEFINITIONS: See Glossary Section for definitions. Any definitions included here are for purposes of this procedure only.

1. **ADMINISTRATIVE CHANGE** – A type of change that does not affect the essential elements of the contract (e.g., essential elements such as quality, quantity, price, time for performance, etc.). Examples are: changing the names of state or supplier contacts, address changes (but not changes to the parties), etc.
2. **AMENDMENT** – Generally, a written document used to effect a contract change. Usually requires the bilateral agreement of the parties. See also Change Order (for unilateral changes) and Change (paragraphs 7 and 8 on the next page). In California State government usage, a “formal” amendment is a type of amendment with special internal approval requirements. To avoid confusion in the type of document selected to modify the contract, the generic term “change” is recommended.
3. **APPARENT AUTHORITY** – In the law of Agency, it is such authority as the principal (i.e., the State) knowingly or negligently permits the agent to assume, or which he holds the agent out as possessing. It is such authority as the agent appears to have by reason of the actual authority which he has, or which a reasonably prudent person, using diligence and discretion, in view of the principal’s conduct, would naturally suppose the agent to possess. It includes the power to do whatever is usually done and necessary to be done in order to carry into effect the power actually conferred by the principal.
4. **BILATERAL CHANGE** – A change that requires the advance agreement of the parties to the contract. All changes must be bilateral unless the contract defines conditions under which unilateral changes may be made. Bilateral changes are used to make negotiated contract adjustments. Sometimes known as “supplemental agreements”, bilateral changes usually require new consideration and are evaluated to determine if all the elements essential to the formation of a contract are present (i.e., offer, acceptance, consideration, lawful purpose and competent parties). Bilateral changes can be used to carry out the original intent of the contract (e.g., to provide a contract adjustment resulting from a unilateral change) or can cover entirely new subject matters and create new relationships between the parties and need not be based on any authority existing in the contract. Bilateral changes are not to be used to avoid the requirements for competition or to waive an existing State right.
5. **BUYER** – See Glossary.

6. **CARDINAL CHANGE** – A contract change that significantly alters the scope of the contract beyond the original intent of the parties and which might be technically considered a breach of the contract. To determine whether a change is within the contract scope it is necessary to determine whether the parties could have reasonably contemplated it when the contract was initiated. The term “cardinal” refers to the points of a compass and in nautical terminology (as in this usage) a cardinal change shifts the direction away from that course on which it was established. Sometimes referred to as a “sea change”.
7. **CHANGE** (also known as Contract Modification) – Any written modification to the terms of a contract, whether unilateral (by use of a Change Order) or bilateral (by use of an Amendment), signed by an authorized representative of the State. Includes Amendments, Purchase Order Alterations and Supplements, Work Authorizations, etc. Can include verbal constructive changes. See also Request for Contract Adjustment, paragraph 15.
8. **CHANGE ORDER** – A written document that directs a supplier under an existing contract to make a change to the contract, which is signed by an authorized purchasing representative of the State. Usually unilateral direction from the State for the supplier to make changes to the scope of work as permitted by the Unilateral Changes clause or other provision of the contract. See also Change (above), Amendment (paragraph 2), and Attachment 1, Understanding the Unilateral Changes Clause.
9. **CONSIDERATION** – The exchange of something of value between the parties. The buyer must obtain consideration from the supplier when the supplier requests a contract change to provide relief from contract requirements due to the supplier’s inability to perform. Examples of supplier consideration could be a price reduction, additional goods or services at no additional charge, accelerated performance on other aspects of the contract in return for schedule relief on some requirements, or other “trade offs”. Where the impact to the supplier is caused by the state delaying supplier performance or changing contract requirements, the state is obligated to provide consideration to the supplier. Often the state can compensate the supplier by payment for additional goods or services or providing schedule relief or other trade offs. In all cases, the value of the consideration must be determined to be fair and reasonable.
10. **CONSTRUCTIVE CHANGE** – A change that is effected verbally, by action of the contracting parties or by inaction that causes the supplier to perform work beyond the required contract terms based upon the perception that the state directed the change, usually because a person with “implied” or “apparent” authority directed supplier personnel. The term constructive change was derived from case law where the courts created a legal construct under equitable principles to remedy wrongs when a change had occurred due to action of a party that resulted in additional work being done. In other words, a constructive change is deemed a change under the Unilateral Changes clause by circumstances. The term is sometimes known as a “gentlemen’s agreement”. Constructive changes are distinguished from technical direction in that technical direction remains within the contract requirements and does not change the scope of work as written. Differences or errors in contract interpretation can often result in constructive changes, as can failure by the state to correct a known defective specification or where the state has “superior knowledge” or fails to disclose information that is essential to contract performance or impossibility of performance, etc. See Attachment 2, Understanding and Managing Constructive Changes.

- 11. CONTRACT ADJUSTMENT** – A contract change which is usually negotiated to reflect the agreement of the parties as to the impact to price, schedule or other terms and conditions caused by a prior unilateral change. Sometimes referred to as a “settlement”. See also Request for Contract Adjustment, paragraph 15.
- 12. DISPUTE** – A difference of contract interpretation between the State and the supplier or asserting a right to contract performance by one party against the other, which is resolved by the method set forth in the Disputes clause of the contract.
- 13. IMPLIED AUTHORITY** – In the law of Agency, power given by the principal to the agent which necessarily follows from the express authority given, though such power is not expressly asserted. Actual authority may be either express or implied, “implied authority” being that which is necessary, usual and proper to accomplish or perform the main authority expressly delegated to an agent.
- 14. PRICE ADJUSTMENT** – The value of the change transaction used to determine documentation and approval requirements. It is calculated as the aggregate (or total value) of the increases and decreases in price for a change transaction. Example: A contract was originally issued for a value of \$100,000. In a later change transaction, the change causes a \$40,000 decrease in the scope of work and a \$70,000 increase in the work required. Therefore, the total contract value increases to \$130,000 (the original value of \$100,000 plus \$70,000 and minus \$40,000) and the net value of the change is \$30,000 (the difference in the change amounts). However, the price adjustment is \$110,000 (\$70,000 plus \$40,000 without regard to subtracting the value of the deleted work). Note that an administrative change to a contract that does not affect the contract value is deemed to have a price adjustment of zero (e.g., re-identification of existing line items; change of address; clerical errors; invoice instructions, etc.).
- 15. REQUEST FOR CONTRACT ADJUSTMENT** – Also known as claim for equitable adjustment. A written submission by a supplier that states the basis for an adjustment to the terms and conditions (usually the delivery schedule or price or both). This may: (1) occur as a result of unilateral changes imposed by the State under the Changes clause of a contract; or (2) result in a bilateral change to contract terms and conditions agreed upon by both parties; or (3) occur from a constructive change to the contract. The State may also make a claim against a supplier for consideration for failure to provide full value for which the State bargained.
- 16. SOLE SOURCE** – Where a supplier is the only known supplier who is able to provide the goods or services needed for award of a contract. Normally this term applies only to the initial source selection decision that results in contract award and is inapplicable to contract changes once the initial award decision has passed. However, in the event that a change is processed for the convenience of the buyer to add additional quantities of goods or services to an existing contract that could have been competitively bid, then the change transaction is deemed outside the scope of the contract and is treated for purposes of documentation and approvals as if it was a sole source award.
- 18. SUBSTANTIVE CHANGE** – A change that affects one or more of the essential elements of the contract (e.g., specifications, quantity, price, quality, delivery, etc.) as contrasted to an administrative change which does not substantively affect the contract.
- 19. UNILATERAL CHANGE** – A change directed by the State, not requiring agreement by the supplier, as permitted by the terms of the contract, that the other party must perform. Bilateral agreement of the parties is not required. A subsequent bilateral change will often be required that adjusts the contract appropriately. Examples of

unilateral changes are: changes under the Changes clause, exercise of contract options, stop work, termination for convenience and termination for default.

C. PROCEDURE:

1. There is no substitute for good planning prior to the solicitation phase of a procurement or for well-developed statements of work to properly define the State's requirements. However, changes to a contract after award that are within the general scope of the contract are often necessary due to changing business circumstances, the details of which could not reasonably have been foreseen when solicitation and contract requirements were initially developed. Therefore, it may be appropriate to modify a contract and in many cases, fundamental concepts of fairness require that the State modify a contract to reflect the ongoing relationship of the parties as it evolves. The State, as a trustee of public funds needs a mechanism built into the way it buys to alter or change the contract requirements during the course of contract performance in the event circumstances or the State's requirements change due to advances in technology, urgency of the requirement, unanticipated limitations on funding, overly optimistic estimates of the supplier's capability, and information unknown at the time of contract award.
2. While the State is entitled to obtain high quality, on time contract performance at fair and reasonable prices, suppliers are only obligated to perform to the minimum requirements of the contract. Since rarely is any Statement of Work so perfectly written that no ambiguity exists, opportunities for contract changes are common and should be expected. Contract changes are not inherently bad. Making a change to the contract in no way compromises the integrity of the solicitation process as long as the change is within the scope of the contract, as the parties could reasonably anticipate that some change would occur, particularly in complex contracts.
3. The State has a right to demand that the supplier fully perform the contract and to enforce its rights, both State and supplier personnel must know and understand the precise details of the statement of work and other contract provisions. See CAM 3.3.4, Developing the Specifications/Statement of Work. However, the State must expect that requiring suppliers to perform additional work will require additional compensation and that suppliers are not being unreasonable to expect to attain a fair profit on additional work. It is unethical for the State to suggest, encourage or coerce suppliers to perform work that is not in a contract at no additional cost or in return for other consideration to which the state is not entitled. It is also improper to retaliate or threaten retaliation against suppliers by withholding future business or penalizing a supplier in any other manner if the supplier submits requests for contract adjustments to changes directed by the state or attempt to assert their legal rights and may be a violation of state law.
4. In the event that any person knows or suspects of improper actions taken, or proposed to be taken, against suppliers or by those involved in the contracting process, they will notify the appropriate organization shown below. Management shall take appropriate disciplinary action.
 - a. Any allegations of improper actions by state contracting personnel may be brought to the attention of the Procurement Division, Acquisition Quality Assurance Program.
 - b. Any activity that violates or may violate any state or federal laws will be brought to the attention of the Office of the Attorney General.

- c. Any State employee or representative engaged in any improper activities which directly or indirectly relates to the contracting process are subject to disciplinary action up to and including termination from State service.
5. All buyers shall use appropriate contract administration techniques to ensure successful contract performance, including ensuring that the contract is properly enforced to protect the State's rights and remedies and to avoid unanticipated cost overruns. Contract changes must be processed promptly so that the contract constantly reflects the ongoing business relationship and intent of the parties. All persons, both State and supplier personnel, must be thoroughly familiar with the contract requirements and understand the consequences of their actions on the State's ability to obtain contract performance. Training is essential. Agencies shall establish streamlined contract change approval processes consistent with this procedure and any delegation instrument to facilitate proper contract administration.
6. The need to change the contract can be identified by the State agency program personnel, the buyer or the supplier. Changes can be made to any provision of the contract bilaterally (i.e., after mutual agreement of the parties) and changes may be directed by the State unilaterally, under certain specified conditions expressly identified in the contract. For more information on understanding the Unilateral Changes clause, see Attachment 1, Understanding the Unilateral Changes Clause. However, the contract is not effectively changed until an approved, written change is prepared and issued to the supplier.
7. When determining whether a contract change is required, buyers must recognize that changes often have a broad impact to the supplier. The supplier may incur costs for performing otherwise unnecessary work, altering the sequence of operations, re-allocating resources, working in later time periods at higher cost or possibly work stoppage. The supplier might be entitled to recover costs of idle workers and equipment, loss of efficiency, obsolescence of goods which are at or near completion, increased labor and material rates and unabsorbed or extended overhead. The buyer should attempt to understand the full impact of a proposed change to the supplier before authorizing a change and determine that a change is essential to program success, not simply desirable, because the state agency must be able to meet its obligations to fund the change and meet its other business needs.
8. No representative of the State, whether in the Procurement Division or any State agency, is authorized to verbally direct changes to any contract and such unauthorized action may be grounds for disciplinary action. When constructive changes occur, a written contract change must be processed to conform the contract to the intent of the parties. For more information on understanding constructive changes, see Attachment 2, Understanding and Managing Constructive Changes.
9. Buyers shall use authorized forms to effect a contract change in each and every instance that any aspect of the contract is modified, no matter how minor. The contractual document used to effect the change can be a Change Order (for unilateral changes) or contract Amendment (for bilateral changes). Amendment documents may also be used for unilateral changes, where they are identified on the document that they are issued under the Unilateral Changes clause of the contract. Work Authorizations are considered as changes and can also be either unilateral or bilateral depending on what is being changed and how the contract defines the use of the Work Authorization process. Established procedures may identify other approved change documents. Letters shall NOT be used to change the contract and are limited to general correspondence related to contract administration, including providing technical direction to clarify existing contract requirements. Any time that any change is made to the

contract, it will be reflected in any automated systems that record contract amounts and other pertinent information.

10. All contract changes that impact the supplier in any way (i.e., are “external” to the State’s processes), regardless of the form of the document used, shall be separately and sequentially numbered. A log of all changes shall be kept with the contract file (see CAM 3.6.1, Contract File Documentation, Appendix 4, for a sample of a Change Log). The log shall also track any internal changes made which might not be distributed to the supplier because it does not impact the supplier’s work (e.g., change to accounting information, internal delivery locations, etc.) Internal changes are not numbered, but may use letter designations to distinguish them from external changes, or if not lettered, may be identified by the date processed.
11. All changes, regardless of the form of the document used, shall be approved, as required, in advance of the supplier beginning the changed work. When a change is deemed a “formal” amendment with additional special approval requirements, approvals shall be obtained in accordance with established procedures. State representatives shall not encourage suppliers to begin to perform changes to the work based on verbal authorization or at their own risk. Failure to obtain all required approvals prior to authorizing the supplier to begin any changed work is grounds for disciplinary action.
12. Changes are implemented as follows:
 - a. The ONLY approved method where the change requires the bilateral agreement of the parties, requires the buyer to negotiate the change with the supplier and issue an approved change document in advance of the required effective date. This method is also strongly encouraged even in those situations where the state has the right to direct a unilateral change under the terms of the contract, if time permits.
 - b. If time to implement a unilateral change is short, the next best alternative is to query the supplier to determine the estimated impact of a potential change, even obtaining a written cost estimate (rough order of magnitude or “ballpark” amount is acceptable), in order to understand what the state’s potential liability might be before directing a unilateral change. The change order does not need to include any cost amount since a subsequent change will be processed to incorporate any contract adjustment.
 - c. However, buyers may issue change orders with a “not to exceed” amount to designate an amount of money which the supplier may not exceed while negotiations are pending. Alternatively, the buyer may include an “estimated value” on a change order. Buyers may also include a time period during which they intend to complete negotiations. If a not-to-exceed amount or estimated value or a time limit is included in the change order, the buyer must be diligent in ensuring that the work does not exceed the amount or time limit without processing either the change which incorporates the results of the buyer’s evaluation and negotiation or an interim change to add to the not-to-exceed amount or estimated value or the time limit.
 - d. Where it is essential to immediately redirect a supplier’s work, a change order may be issued without determination of the potential cost or schedule impact in advance. However, the State must be prepared to honor any reasonable request for contract adjustment and negotiate in good faith to arrive at a fair and reasonable price or other consideration when the state directs a change.
13. For complex contracts, it is recommended that a Change Board be established consisting of State program representatives, the contract administrator and buyer

responsible for contract changes, as well as supplier program and contract representatives. Change Boards can assess the need for proposed changes, provide a forum for prompt resolution of issues that result in contract changes and minimize the possibility of disputes. Change Boards can authorize buyers to process changes and avoid intermediate approvals that delay the issuance of changes as a special process if permitted by established procedure, delegation or agency supplement to this procedure. For Information Technology acquisitions where an Executive Committee is established, the Executive Committee may serve as the Change Board.

14. Each change transaction shall be separately analyzed, documented and approved in accordance with established procedures. For a change transaction, the documentation will discuss: (1) what circumstances caused the need for a contract change; (2) what impact the change has (e.g., price, schedule or other terms or conditions, etc.); (3) whether the supplier is entitled to a contract adjustment; (4) the results of any negotiation of price, schedule and/or other terms and conditions; and (5) any other pertinent facts, events and decisions related to the change transaction. See CAM 3.6.1, Contract File Documentation.
15. In determining entitlement to a request for contract adjustment, the buyer shall analyze the request to determine whether the supplier is entitled to relief as a result of the State's actions. Generally, if the State has caused the supplier to engage in work not previously included in the contract and the basis for the request is NOT due to the supplier's fault or failure to perform (or where the contract provides for an excuse for an action), entitlement is established. This can occur because of an express written change or by a Constructive Change. When the supplier requests relief to price, schedule or both, and the basis for the request is due to the supplier's fault, then the State is prohibited from making the change (which would be a gift to a supplier) unless the State receives consideration (or something of value) in return for agreeing to the change. Any time the State makes a contract adjustment, the buyer shall also analyze the value of the changed work.
 - a. The buyer must be familiar with the contract requirements and may consult technical personnel to determine how the changed work differs from the existing contract requirements. Where more than one change is being processed at the same time, the buyer must segregate those changes that add to the existing work requirements from those that reduce or substitute work for existing requirements. This is an essential first step to determining the price adjustment value of the change which determines what approvals and documentation are required.
 - b. A price reduction may be appropriate if the work scope is reduced or comparable work is substituted in place of other work.
 - c. Generally, when a supplier requests an increase to the contract price or cost, the burden of proof of the value of the change is on the supplier whereas, generally, the state must bear the burden of establishing the value in a decrease in price or cost.
 - d. The fact that a supplier is incurring additional costs in performance does not automatically entitle the supplier to recover those costs unless the extra costs are specifically linked to an identifiable change. Buyers must avoid letting suppliers "get well" for prior inefficient performance by claiming increased costs associated with changes. However, suppliers are entitled to a reasonable profit on the changed work, as profit is a motivator to efficient and effective contract performance. Profit should bear some relation to the amount of risk to cost, schedule or performance that the supplier undertakes. Careful evaluation, price/cost analysis and negotiation

will serve the buyer to adequately protect the state's interest. See CAM 3.5.5, Price/Cost Analysis, and the following section for additional guidance.

16. Where the consideration impacts contract price or cost, the buyer shall perform and document a price or cost analysis and determine that the value of any increase or decrease is fair and reasonable (or the best obtainable price in the circumstances) in accordance with CAM 3.5.5, Price/Cost Analysis.
 - a. It may be possible to use price analysis techniques (such as historical price comparisons or in-house estimates), if reliable data is available or can be developed. Often, a more detailed cost analysis is required to support negotiations of changes.
 - b. Suppliers must provide supporting documentation with their request for contract adjustment. Supporting documentation typically consists of actual cost data or estimates based on actual costs experienced.
 - c. Pricing may be evaluated prospectively or retrospectively. Prospective pricing involves estimating the costs to be incurred (or saved) in determining the adjustment. Retrospective pricing evaluates the adjustment after the work is completed and looks at the difference between what it would have cost to do the work under the existing requirements as opposed to the changed requirements. Prospective pricing is the preferred method as it places some risk on the supplier for efficient performance, especially in fixed price contracts. Retrospective pricing is often the only method available for constructive changes and is another reason why constructive changes are not favored.
 - d. Where the consideration impacts contract requirements other than price, the buyer shall document why the trade off is appropriate consideration and benefits the state.
 - e. Negotiations are often required to accomplish the determination of the value of the consideration for the change. Management may determine that the change requires a written Negotiation Plan and Negotiation Summary, in accordance with CAM 3.5.5, Price/Cost Analysis and 3.5.6, Negotiating Transactions.
 - f. For additional guidance, see Attachment 3, Evaluating the Price of Changes.
17. In the event that the supplier's request for contract adjustment amount cannot be substantiated or negotiations do not result in mutual agreement on the fair and reasonable value of any change, the buyer may, after consultation with management, unilaterally determine a fair and reasonable amount and issue a change to conform the contract accordingly. Documentation of the attempts to achieve agreement and the basis for the buyer's evaluation shall be included in the file and management approval shall be obtained. Bilateral agreement of the supplier to the change under these circumstances is not required. If the supplier objects, the supplier may proceed under the Disputes clause of the contract. See CAM 3.7.6, Dispute Resolution.
18. If the change is determined to be outside the general scope of the contract (e.g., the addition of quantities or items not originally contemplated in the contract award or a cardinal change which fundamentally alters the nature of the procurement such that it would be unfair to potential bidders to deny them the opportunity to compete for the contract, as changed), the change transaction must be treated as if it was a new sole source procurement, even though it might be accomplished by use of a contractual change document for convenience. Process the sole source procurement change and document it and obtain approvals in accordance with established procedures. See CAM 3.4.1, Competition vs. Sole Source. An alternative, if time permits, is to terminate the

contract for the convenience of the state in accordance with CAM 3.7.7, Contract Termination, and initiate a new procurement with changed requirements. Recognize that while competition is strongly preferred, if termination is selected and work has already begun, the termination can require the State to pay more costs than would be required if a change was processed. Buyers are encouraged to perform a cost-benefit analysis to assist managers in determining which approach to take.

19. It is recommended that in addition to the official contract file which maintains the documentation required for initial contract award and each change as separate transactions in accordance with CAM 3.6.1, Contract File Documentation, that buyers prepare a working copy of the contract which is annotated to denote the impact of any changes and such file shall be designated as a "living contract" or "working copy" for purposes of post-award contract administration. The working copy need not be retained after the contract is closed out. See CAM 3.7.10, Contract Closeout.

D. RESPONSIBILITIES:

1. All persons involved directly or indirectly with contractual matters shall review and understand the requirements of the contract. After contract award, the buyer with authority to make contract changes shall be included in or advised of all communications (verbal or written) between State personnel and the supplier.
2. Buyers and agency program management will establish streamlined procedures to perform proper post-award contract administration, including the timely processing of contract changes.
3. Program management will establish Change Boards for complex procurement transactions to determine the need to process changes and to streamline the approval process for contract changes.
4. All State personnel shall report known or suspected improper contract activities to the Procurement Division, Acquisition Quality Assurance Program or the Office of the Attorney General, and take appropriate disciplinary measures as required.

E. ATTACHMENTS:

[Attachment 1: Understanding the Unilateral Changes Clause](#)
[Attachment 2: Understanding and Managing Constructive Changes](#)
[Attachment 3: Evaluating the Price of Changes](#)

F. AUTHORITY AND REFERENCES:

1. Statutory: None
2. Administrative: None
3. Procedural: [CAM 3.3.4 - Developing the Specification/Statement of Work](#)
CAM 3.3.6 - Selection of Contract Type
CAM 3.4.1 - Competition vs. Sole Source
CAM 3.5.5 - Price/Cost Analysis
CAM 3.5.6 - Negotiating Transactions
CAM 3.6.1 - Contract File Documentation
[CAM 3.7.6 - Dispute Resolution](#)
CAM 3.7.7 - Contract Termination
CAM 3.7.10 - Contract Closeout

RALPH CHANDLER, Deputy Director
Department of General Services
Procurement Division

Issued by: PD Policies and Procedures Unit

email: CAMSERV@dgs.ca.gov

DRAFT